

(2005) 02 KAR CK 0016
In the Karnataka High Court
Case No : Writ Petition No. 44743 of 2004

Raghavendra Sherrigar

APPELLANT

Vs

Assistant Commissioner of Commercial Taxes and Another

RESPONDENT

Date of Decision : 17-02-2005

Acts Referred:

Constitution of India, 1950 — Article 227

Karnataka Sales Tax Act, 1957 — Section 17 (6), 20, 25 A, 25 A (1), 5 B

Citation : (2005) 142 STC 153

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : H.B.V. Patil and Shalini Patil, for the Appellant; Kempanna, High Court Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This is a case which clearly reveals arbitrary and mala fide action on the part of the respondent No. 2 assessing officer.

2. Though the record indicates that the assessee had, in fact, made it clear that he had opted for payment of tax by way of composition under the provisions of Section 17(6) of the Karnataka Sales Tax Act, 1957, before passing of the assessment order, though there is supporting material to this effect on the record itself, the assessing officer, nevertheless, denies the benefit of payment of tax by composition provided u/s 17(6) of the Act and has proceeded to pass the assessment order de hors the provision.

3. The assessment order again suffers from a total non-application of mind as while assessing to tax the turnover under the provisions of Section 5-B of the Act, the assessing officer has levied tax on the entire turnover i.e., on the entire value of the works contract itself at 10 per cent without deducting the value of such goods which were not taxable and the value of the services. On the face of it, the assessment order is also not tenable.

4. The stand taken on behalf of the respondents is that the authorities had not received an application in form 8-AA under rule 8-B of the Rules which is a request by the assessee opting for or indicating that the assessee had opted for payment of tax by way of composition in terms of Section 17(6) of the Act.

5. The dispute arises in the context of computation of the tax payable by the petitioner--a registered dealer under the provisions of the Karnataka Sales Tax Act, 1957, particularly the tax payable in terms of Section 5-B of the Act, the assessee being a contractor. In respect of such assessees, u/s 17(6) of the Act, an option is given to pay tax by opting for composition in which event, the assessee has to pay tax at the rate of 4 per cent on the entire value of the contract and if not tax at 10 per cent on only such value of the goods involved and taxable in the execution of the works contract. While, the petitioner-assesses has maintained all along that he had opted for composition and is liable to pay tax only at the rate of 4 per cent of the value of the contract, the respondent particularly, the respondent No. 2 having taken the view that the assessee had not elected to pay tax by composition by submitting form 8-AA, the liability can only be in terms of Section 5-B of the Act at 10 per cent on the value of the taxable goods involved in the execution of the works contract.

6. In support of the petitioner's claim and plea, copies of form No. 8-AA application for composition dated April 16, 1999 (copy at annexure A) and return in form 4 dated June 8, 2001 (copy at annexure A1) are placed. While the respondents have disputed the submission of form No. 8-AA application on the premise that it is not available in their records, there is no dispute about the receipt of the return in form 4, wherein also it is indicative that the assessee had opted for composition as the assessee had filed a return and quantified the tax payable at 4 per cent composition rate at a point of time which is about two years prior to the actual order of assessment. In the assessment order though on page 1 typed portion in the preamble, it is indicated that the order is one in terms of provisions of Section 17(6) of the Act, nevertheless, the order proceeds on the premise that it is a regular assessment and in the body of the order, it is indicated that the assessee had not furnished form No. 8-AA as required u/s 17(6) of the Act. In the concluding portion, however, the assessing officer again refers to this aspect and indicates that the request for composition that the assessee had opted for had been brought to the notice of the assessing officer for the first time, only at the time of hearing and as the request in the prescribed form was not available on record, the assessment was being finalised on regular basis. While the turnover declared by the assessee is accepted, it is taxed on regular basis at 10 per cent on the entire turnover.

7. The assessee on receipt of the assessment order realising that the return of turnover filed in form 4 had come to be assessed on a regular basis u/s 5-B of the Act and the request for composition has been declined on the ground that no application in form 8-AA was available on the record, has made efforts to set right the same by filing a rectification application on June 16, 2003. But, this

attempt was stalled as the assessing officer issued an endorsement dated August 21, 2003, indicating that the request cannot be acceded as there was no application seeking payment of tax by way of composition.

8. Though the assessee it appears had preferred an appeal u/s 20 of the Act to the Joint Commissioner of Commercial Taxes, the appeal was also dismissed in terms of the order dated January 12, 2004 (copy at annexure C). The appellate authority having indicated that there was no ground to interfere with the endorsement of the assessing authority declining to rectify the assessment order, the assessee's hopes of getting the assessment order corrected appeared to have come to an end.

9. The amending Act 26 of 2004, which came into effect from August 1, 2004 appears to have rekindled the hopes of the assessee under which a proviso was introduced to Section 25-A(1) of the Act. It reads as under:

"Provided further that where an application is made by an assessee for rectification of any mistake in an order, as being apparent from the record and, such application has not been rejected by the assessing authority within sixty days from the date of receipt of the application, the order shall be deemed to have been amended rectifying such mistake."

The assessee thought he could take advantage of this provision and filed yet another rectification application on August 6, 2004 before the assessing authority. The assessing authority having not taken any action for a period of more than sixty days, is now claiming the benefit of the deeming provision and as the authorities in the meanwhile sought to enforce the liability as determined under the assessment order and recovery of further interest on this amount by issue of the demand and recovery notice dated July 28, 2004 [copy at annexure E], the present writ petition was filed praying for a declaration that rectification application filed by the applicant as on August 6, 2004 should be declared to have been allowed under the deeming provision as introduced by the Act 26 of 2004 and the assessee should be enabled to have the consequential reliefs, etc. That is how the present writ petition is filed.

10. On notice to the respondents, the respondents have entered appearance and have filed a detailed statement of objections. The tenor of the objections is mainly with regard to the prayer as sought for in the writ petition; that the assessee having once sought for rectification of the assessment order and as against this very endorsement having preferred an appeal and the appeal also having come to be dismissed, the assessee cannot go back to the assessing officer and seek for another rectification; that the application for rectification is not tenable in law; that the assessing officer was not required to do anything at all on such a second rectification application dated August 6, 2004; that the earlier endorsement having got merged in the appellate order, the assessing authority is not at liberty to rectify the assessment order even assuming that the second rectification application is also within the time permitted u/s 25-A of the

Act. The respondents have contended that there is absolutely no merit in the writ petition; that there is no scope for interference in the exercise of writ jurisdiction; that the petitioner-assesses is liable to pay tax and interest as demanded under the notice dated July 28, 2004 (copy at annexure E) and in the circumstances, the writ petition is liable to be dismissed.

11. I have heard Smt. Shalini Patil, learned Counsel for the petitioner and Sri Kempanna, learned Government Pleader. I have also perused the records placed before me by the learned Government Pleader. The matter was heard on several occasions and was hotly contested.

12. It was passionately urged on behalf of the petitioner that the petitioner has been subjected to untold suffering and misery; that the petitioner is subjected to liability over and above what was permitted in law and was really justified in law; that the petitioner will be left high and dry if no relief is accorded; that justice will suffer if the assessment order as originally passed by the assessing authority which is one not tenable on the face of the record is allowed to remain and tax liability enforced and recovered from the petitioner in terms of this order.

13. Though the matter of this nature does not detain a writ court for long and such matters are rarely examined, for interference in the exercise of writ jurisdiction, non-interference is not a matter of rule nor interference as a matter of course. Though in the normal course, such petitions are not dealt with, as the matter was heard at length and the contention was as to whether the assessee had, in fact, requested for payment of tax by way of composition earlier at any point of time before the assessing authority passed the assessment order and the rejection of such request was solely based on the ground that such application was not available on the record and as I felt that there was something wrong in the dogged manner in which the assessing authority had persisted with the only stand that there was no such application on record, the respondents were directed to place the record before this Court. It is in this context that the record was also examined.

14. While the record does contain a copy of the application in form No. 8-AA dated April 16, 1999, what is submitted by the learned Government Pleader is that this had been subsequently received and was not available on record on the date the assessing officer passed the assessment order.

15. Smt. Shalini Patil, learned Counsel for the petitioner points out that as it was indicated to the petitioner that the application for composition dated April 16, 1999 which had been submitted by the petitioner was not available on record, the petitioner had given another letter along with copy of this form No. 8-AA on February 26, 2003 indicating that the assessee, in fact, had filed an application in form No. 8-AA and had opted for composition and as it had been made known to the petitioner that it was not forthcoming on the record: that it was possibly misplaced and not brought to the notice of the assessing officer and as such another copy of the application is being appended to this letter dated February

24, 2003 with a request that it may be placed before the assessing officer and appropriate orders passed. It is also indicated therein that the assessee having died, son of the assessee could not follow up the matter as and when the development took place and if there are any lapses on their part, it may be condoned. This letter and copy of form No. 8-AA application which in itself is dated April 16, 1999 is received at the office of the respondent No. 2-assessing officer on February 26, 2003, i.e., at least two months before passing of the assessment order.

16. Learned Government Pleader, Sri Kempanna, appearing on behalf of the respondents has submitted that the copy of the application in form 8-AA was submitted to the assessing authority only subsequent to the passing of the assessment order: that the record did not contain a copy of this application at any point of time earlier and the copy of the application as submitted subsequently on examination did reveal discrepancies in the signature of the assessee as found on this application and on other correspondences and documents submitted by the assessee: that the signature in the application did not appear to be genuine and that the copy of the application should be obviously a made-up or fabricated document to gain sympathy of the court: that the submission of the petitioner should be rejected and the writ petition dismissed.

17. In fact, a perusal of form 8-AA application indicates that it had been acknowledged at the office of the Assistant Commissioner of Commercial Taxes, VI Circle, Navanagar, Hubli-25 on April 16, 1999, but this is sought to be got over by the respondents by submitting that it does not find place on the records and that it has been acknowledged only by a clerk.

18. A perusal of the record definitely indicates that there was sufficient material with them about the receipt of the application in form No. 8-AA possibly on April 16, 1999 itself and even if not on that date, definitely on February 26, 2003. The return in form 4 filed on June 25, 2001, i.e., more than two years before passing of the assessment order clearly lends support to the version of the petitioner that the assessee had filed an application for composition which means the entire turnover is to be taxed at 4 per cent. The assessee, in fact, in the return has not claimed any deduction except for the amount already deducted at source from payments by the Government, but has indicated the liability as 4 per cent on its entire turnover. These were sufficient and clinching material to hold that the assessee, in fact, had opted for composition and the assessment when the assessing officer was accepting the return as filed by the assessee should have been concluded on that premise. Unfortunately, the assessing officer has not only gone on giving untenable and laboured reasons to deny the assessee the benefit of composition, but has proceeded to pass assessment order, by determining the liability at 10 per cent on the entire turnover. Even here, the assessing officer has committed an error.

19. The suggestion on behalf of the respondents that the copy of the application

dated April 16, 1999 in form 8-AA should be a got up document; that it is a forged document, etc., and using this theory as a basis for rejecting the same on the face of it is most illogical and a desperate attempt to avoid scrutiny and getting at truth. It is no doubt true that a finding of fact as recorded by one authority and affirmed by the appellate authority is an aspect which is rarely examined by this Court in the exercise of writ jurisdiction under Article 227 of the Constitution of India and a finding of fact as recorded by the authorities is seldom disturbed. But, occasions are many when a finding is not in consonance with the record; a finding which is a finding not supported by the evidence on record; a finding which is a perverse finding, are interfered and set right even in the exercise of supervisory jurisdiction.

20. The question is as to whether the facts and circumstances warrant interference.

21. While it is no doubt true that collection of revenue is a serious matter for the State -and the bounden duty of the authorities functioning under the Act is to implement the provisions of the Act, there should be safety and assurance to an honest tax-payer. An honest tax-payer should not be subjected to unnecessary harassment and an action not warranted in law, which can be of very serious consequence to the tax-payer if is allowed to remain without correction, such harassment and browbeating of an honest tax-payer will otherwise drive even such honest tax-payers to become cynical and lead to a situation where tax-payers will get a feeling that paying taxes honestly is not a worthwhile exercise; that the tax authorities are a menace to the society rather than simply being representatives of the State for enforcing the tax provisions.

22. The present case illustrates this aspect very vividly. Here is a tax-payer who on a perusal of the record, it is clearly revealed, had opted for payment of tax by way of composition at 4 per cent of the total turnover. The total turnover is Rs. 52,66,485. The liability on such turnover as indicated in the return filed by the assessee is Rs. 2,10,659. This has been made categorically clear by the assessee even in terms of the return dated June 8, 2001 filed in form 4 for which an acknowledgement is issued. The acknowledgement indicates that the tax liability is discharged. The assessment is taken up two years thereafter. The assessee's claim of having opted for composition is rejected on the premise that the application in form 8-AA is not available on the record: that such a request is brought to the notice of the assessing officer for the first time during the course of finalisation of the assessment order. The record indicates to the contrary. The entire turnover is subjected to tax at 10 per cent raising the total liability to Rs. 6,05,646. It appears the assessee who had filed an application and return and had paid taxes, died on April 6, 2002 in an accident and the assessment proceedings had been continued on his son as the legal heir. The legal heir has brought to the notice of the assessing officer not only the filing of the application earlier for payment of tax by way of composition, the filing of the return in form 4 indicating the tax liability on the turnover at 4 per cent, the rate at which it

could have been compounded and even yet another application/letter dated February 26, 2003 much before the assessing authority passed the assessment order bringing these aspects to his notice. All these things are brushed aside, the assessment order is passed determining the tax liability at 10 per cent on the entire turnover without allowing the deductions required to be allowed in law and the assessee called upon to pay the tax in terms of such an order. Even when this writ petition was heard before this Court, the respondents have persisted with the stand that no application has been filed; that there was no occasion for the assessing officer to have referred to it; that what has been done by the assessing officer is perfectly justified, etc., even when the record does not support the same.

23. Though no doubt the subsequent developments, rejection of the assessee's appeal against the endorsement and as to whether the assessee could maintain any subsequent application for rectification of this order and also as to whether an assessee can keep filing successive rectification applications are also urged, I find it is not necessary for me to examine these contentions in the light of the most untenable and unfounded submissions made on behalf of the respondents who are defending the order and instructions given for such purpose being contrary to their own records, I am of the view that this is a matter where technicalities should be kept aside and the court should ensure that justice prevails and confidence of law-abiding citizens is retained than to throw out the petition on technicalities. It is for such purpose I have examined even the tenability of the very assessment order. The assessment order dated May 5, 2003 is also not that vintage in point of time as not to warrant scrutiny by this Court in a writ proceedings, the writ petition having been presented in the year 2004.

24. Viewed from any angle, the order passed by the assessing officer is definitely not sustainable, which only indicates an accusing finger against the assessing officer that the assessing officer himself has deliberately passed such an order for ulterior purposes. The reputation of the officers in the Commercial Taxes Department being at a very low ebb and the department being legion for corruption and malpractices, such instances only sustain such a reputation and the conduct on the part of the respondent No. 2-assessing officer does not bring any credit to the reputation of the Commercial Taxes Department, but can only confirm it.

25. In the circumstances, writ in the nature of certiorari is issued. The impugned assessment order dated May 5, 2003 (Copy at annexure B) as also the appellate order dated January 12, 2004 (Copy at annexure C) are hereby quashed. Writ petition is allowed. Rule issued and made absolute.

26. The assessing officer is directed to conclude the assessment in respect of the petitioner for the assessment year 1999-2000 on the basis that the assessee had opted for payment of tax by way of composition u/s 17(6) of the Act and on the return filed by the assessee which had been accepted by the assessing officer

earlier.

27. The conduct on the part of the respondent No. 2-assessing officer is clearly most reprehensible and one which had resulted in considerable harassment to the petitioner-assesses. Such harassment of honest tax-payers only drives them to other methods. It is a case where the petitioner is to be compensated by way of costs and at the cost of the respondent No. 2-Additional Deputy Commissioner of Commercial Taxes. A sum of Rs. 5,000 is awarded by way of cost payable by the respondent No. 2 in favour of the petitioner. Even if the costs are met by the State, the State is at liberty to recover the amount personally from the respondent No. 2.

28. The Commissioner of Commercial Taxes Department is also hereby directed to investigate into the conduct of the respondent No. 2 in the circumstances narrated above and take suitable action in the matter.